



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA

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Order Instituting Rulemaking to Implement)	
Senate Bill No. 1488 (2004 Cal. Stats., Ch. 690)	Rulemaking 05-06-040
(Sept. 22, 2004)) Relating to Confidentiality of)	
Information)	(Filed June 30, 2005)

SOUTHERN CALIFORNIA EDISON COMPANY'S (U 338-E) COMMENTS ON THE
DEFINITION OF "MARKET PARTICIPANT"

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Dated: **August 4, 2006**

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE
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**SOUTHERN CALIFORNIA EDISON COMPANY’S (U 338-E) COMMENTS ON THE
DEFINITION OF “MARKET PARTICIPANT”**

In accordance with Ordering Paragraph No. 15 of Decision 06-06-066 (Phase I Decision), mailed July 5, 2006, and other relevant Rules of Practice and Procedure of the California Public Utilities Commission (“Commission”), Southern California Edison Company (SCE) respectfully submits these comments on the definition of “market participant.”

I.

INTRODUCTION

The Phase I Decision required that more data than ever be open to market participants: capacity net open data more than three years ahead – even at the monthly and daily levels, forecast data of the net open when it is only one year old, substantial amounts of contract information, still-active contracts, and a wide assortment of information that can be used to back into even more sensitive data. Given the wide range of data now available to those who sell power to, or buy power from, investor-owned utilities (IOUs) and other load-serving entities (LSEs), the definition of “market participant” should include all those whose awareness of market-sensitive information could result in raising prices above competitive levels.

There are is an important reason why the definition of “market participant” should be broad. Since only a very limited amount of market-sensitive data is still protected, the Commission must be careful that this data is not produced to those who can use it to harm SCE’s bundled service customers by either physical or economic withholding of critical resources. It should be noted that even those defined as “market participants” will now have access to a broad range of data that they sought in this proceeding. Thus, if there is a legitimate dispute as to whether a particular party is a “market participant,” the question should be resolved in favor of finding that it is.

II.

THE GENERAL DEFINITION OF MARKET PARTICIPANT

The Commission has correctly recognized that Public Utilities Code Section 454.5(g) demonstrates “a clear legislative intent to distinguish between non-market participants and market participants.”¹ As the Phase I Decision notes, “The Legislature’s concern about protecting the confidentiality of ‘market sensitive’ information logically includes restrictions on access to data for those who operate in that ‘market.’”² The definition of “market participant,” would appear to include any party – including SCE – which transacts or advises others how to transact in the California energy markets.

In the long-standing protective order governing prior procurement proceedings, the term “market participating party” (abbreviated to “MPP”) was defined as:

- 1) An employee of a private, municipal, state or federal entity that engages in the purchase, sale or marketing of energy or capacity, or the bidding on or purchasing of power plants, or consulting on such matters, or an employee of a trade association comprised of such entities that engage in one or more of such activities; or

¹ Phase I Decision, p. 45.

² Phase I Decision, pp. 45 – 46.

- 2) An attorney, paralegal, expert or employee of an expert retained by an MPP for the purpose of advising, preparing for participating in Procurement Plan and Compliance Reviews regarding [IOU].³

This definition generally makes sense, although Part 2 should be broadened as follows:

- 2) An attorney, paralegal, expert or employee of an expert retained by an MPP for the purpose of advising, preparing for or participating in Procurement Plan and Compliance Reviews regarding [IOU], participating in other Commission proceedings, or negotiating transactions with an IOU on behalf of an MPP.

Since the Phase I Decision and the Matrix apply to “data regardless of the proceeding in which they are relevant, including the proceedings listed in this decision, successor proceedings, or proceedings not listed in this decision in which the data are relevant,”⁴ the definition of market participant must be broadened to capture the full range of proceedings in which confidentiality issues may arise. Moreover, to avoid the situation where the representative of a consumer or trade group represents an individual power seller in negotiations with an LSE, the term “market participant” must also include those who negotiate transactions with an LSE on behalf of market participants.

A trade association or other organization composed of or representing persons or entities that engage in one or more wholesale or retail energy market activities should be considered a “market participant” for all practical purposes. (For example, California Manufacturers & Technology Association (CMTA), which includes in its membership entities such as Calpine Corporation, Constellation New Energy, Crystal Energy, Mirant, Northern Power Systems, Occidental Energy Marketing, Reliant Resources, and, yes, SCE,⁵ should be considered a “market participant.”) Typically the Boards of Directors of such trade associations are

³ Protective Order Regarding Confidentiality Of [SCE, PG&E Or SDG&E] Power Procurement Information, (Protective Order) at ¶ 3(h).

⁴ Phase I Decision, p. 19.

⁵ See CMTA Membership page,
http://www.cmta.net/member_list.php

comprised of senior representatives from the member companies. In the case of CMTA, for example, the Board contains representatives from Chevron Products Company, Valero Energy Company, BP, Shell Oil Company, Solar Turbines Company and ExxonMobil.⁶ Presumably, the persons on the CMTA Board, particularly those on the Executive Committee (which also includes representatives of at least three companies which are heavily involved in the energy markets) are the ones directing policy for the organization and the ones to whom any CMTA attorney and consultant must answer. SCE is concerned that if CMTA attorneys and experts were given its confidential market sensitive information, some portion of it could, even through inadvertence, wind up in the possession of persons sitting on that Executive Committee and through them, to their respective companies.

In certain instances, particularly with smaller, more informal trade groups, there is no assurance that the trade organization will not become a conduit of this information to its members directly. This may happen via direct communication or indirectly, in the form of studies, reports, or analyses. At the very least, such trade organizations will be unable to completely disregard the confidential, market sensitive information in advising its members on various issues, which in itself is sufficient reason for such organizations not to receive confidential, market sensitive information.

This is not a question of “ethics,” as IEP and CMTA would make it out to be. SCE trusts that most (but not all) market participants would not deliberately violate a protective order. However, given the level of involvement which attorneys and consultants of market participants commonly have in commercial transactions, market sensitive information cannot be provided to these individuals.

⁶ See CMTA Board of Directors page,
<http://www.cmta.net/directory/board.php>

III.

THE SPECIFIC PROBLEMS FACING ATTORNEYS AND CONSULTANTS

Certain market participant groups have suggested that problems can be avoided by limiting distribution of confidential information to their designated reviewing representatives, usually attorneys and consultants.⁷ These individuals would, in effect, have the status of “non-market participants.” The problem, however, is that the California energy legal and consultant business is limited and insular. Thus, a specific problem in California is that certain attorneys represent trade associations of power sellers in regulatory proceedings and, at the same time, negotiate on behalf of power sellers. For example, a press release from Winston & Strawn described one of its new attorneys as follows:

Bloom, who chaired White & Case’s energy sector practice, is widely regarded as one of the most prominent energy lawyers in the country. His comprehensive regulatory, infrastructure and finance law practice emphasizes independent energy development, operation, restructuring and privatization. Bloom’s clients range from developers to lenders and foreign governments, and he regularly appears on their behalf before local, state and federal regulatory bodies. He is frequently retained to resolve disputes between utilities and independent power suppliers and represents clients in the purchase, sale and restructuring of energy projects and assets. Bloom was influential in helping the industry recover from its recent statewide energy crisis, and he co-chaired the creditors’ committee in Pacific Gas & Electric Company’s Chapter 11 bankruptcy.⁸

The problem of releasing market sensitive information to these individuals was expressed by Mr. Florio of TURN, who stated:

⁷ See CMTA Opening Brief at 13.

⁸ See Winston & Strawn press release at:

<http://www.winston.com/WSNews.nsf/5c45aad9ad57aca086256a7200671f1a/9b811b3bbe8f1537862571a2006fe692?OpenDocument>

A check of Commission proceedings will demonstrate that Bloom did indeed appear in A. 05-12-030 on behalf of California Cogeneration Council (“CCC”) and, according to this press release and in SCE’s experience, has advised and negotiated on behalf of independent power sellers in various contracts.

I can promise not to disclose it, but I can't compartmentalize my brain and say, once I know something, I'll never use that knowledge, because it's just not humanly possible.⁹

It is not a problem for Mr. Florio to obtain the data, because he does not advise parties who sell power to the IOUs. It is a problem, however, for those who give counsel to power-sellers. SCE does not believe that those individuals can obtain confidential data from a utility as representatives of trade organizations and not use it against that very same utility when they negotiate purchases of power for one of their power-selling clients.

Moreover, other law firms concomitantly represent groups of energy customers and energy sellers. Still other law firms concomitantly represent organizations of power sellers and electric service providers, who may buy energy from members of the first organization. Can we be sure that no confidential data obtained by an attorney as a representative of power customers will be leaked, however inadvertently, to the attorney next door, who represents the other side? Can we be sure that a consultant to power buyers does not later end up working for power sellers and using the confidential data he obtained to further his new clients' interests?

The parties to this proceeding have grappled with these issues but have been unable to resolve them. SCE believes that market participants simply should not get confidential data at all. SCE should not get confidential data belonging to PG&E or SDG&E; PG&E and SDG&E should not get SCE's data; and organizations like CCC or CMTA should not get confidential data belonging to any LSEs. Given the wide range of data that market participants will now be given, they can no longer claim that they are being disadvantaged in Commission proceedings.

⁹ TURN/Florio Tr. 814:18-21.

IV.

ALTERNATIVELY, THE COMMISSION SHOULD PROHIBIT THOSE WHO OBTAIN CONFIDENTIAL DATA FROM BEING INVOLVED IN COMMERCIAL TRANSACTIONS FOR TWO YEARS

SCE strongly believes that the policy of not providing confidential data to market participants or their representatives in any Commission proceeding is sound. At the very least, however, to ensure that LSEs' market-sensitive information cannot be misused by individuals, the Commission should adopt the protective order and NDA identified in the Avoided Cost Proceeding (R.04-04-003/R.04-04-025)¹⁰ (the "AC Protective Order"). This Protective Order provides that any individual who signs the NDA is prohibited from being involved in commercial transactions in the California Energy market for two years. It will address the problem of attorneys and consultants who could gain valuable LSE information and later advise counterparties to those LSEs in various transactional matters.

Unfortunately, the AC Protective Order does not address the problem of "ethical walls" within law firms and consultant organizations. That is, it does not ensure that data obtained by the firm as a representative of a "non-market participant" does not fall into the hands of a different attorney or consultant who is the representative of a "market participant." Thus, it should be seen as the second-best solution to the problem of ensuring that the limited amount of data now classified as confidential is protected.

V.

CONCLUSION

For all the foregoing reasons, the Commission should adopt the following definition of "market participant."

¹⁰ See May 9, 2005, ALJs' Ruling on Protective Order and Remaining Discovery Disputes.

1. An employee of a private, municipal, state or federal entity that engages in the purchase, sale or marketing of energy or capacity, or the bidding on or purchasing of power plants, or consulting on such matters, or an employee of a trade association comprised of such entities that engage in one or more of such activities; or
2. An attorney, paralegal, expert or employee of an expert retained by an MPP for the purpose of advising, preparing for or participating in Procurement Plan and Compliance Reviews regarding [IOU], participating in other Commission proceedings, or negotiating transactions with an IOU on behalf of an MPP.

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August 4, 2006

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to the Commission's Rules of Practice and Procedure, I have this day served a true copy of SOUTHERN CALIFORNIA EDISON COMPANY'S (U 338-E) COMMENTS ON THE DEFINITION OF "MARKET PARTICIPANT" on all parties identified on the attached service list(s). Service was effected by one or more means indicated below:

Transmitting the copies via e-mail to all parties who have provided an e-mail address. First class mail will be used if electronic service cannot be effectuated.

Executed this 4th day of August, 2006, at Rosemead, California.

/s/

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630 EAST FOOTHILL BLVD.
SAN DIMAS, CA 91773
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Friday, August 4, 2006

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Friday, August 4, 2006

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FOLSOM, CA 95630
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